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- NEW PROPOSED OVERTIME RULES

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Last Thursday, the Department of Labor (DOL) issued a new proposed rule that would modify the exemptions to the Fair Labor Standards Act (FLSA) overtime rules for certain white collar employees (executive, administrative, professional, and computing positions) and highly compensated employees.

This is the DOL’s second attempt to change the overtime rules in recent years. As you may recall, the Obama Administration issued final rules on the same subject that were set to go into effect on December 1, 2016 and that, among other things, would more than double the minimum salary required for employees to qualify under the white collar exemptions. Then, just a few days before the rules were to go into effect, a federal district court judge issued a nationwide injunction preventing the rule from going into effect on the grounds the scope of the new rule exceeded the DOL’s authority. The Obama Administration appealed the decision but then President Trump was sworn into office before the DOL’s argument on appeal was presented. The Trump Administration chose not to defend the Obama-era overtime rules but instead limited their argument to asserting that the DOL did have the authority to issue such rules. The Trump DOL then went back to the drawing board and issued a Request for Information in the summer of 2017, seeking comments in preparation for a new rule. The proposed rules are the product of this effort.

Similar to the Obama-era efforts, the new Proposed Rule present changes to the regulations that govern how employers can structure their relationship with their employees, which in turn can impact a business’s bottom line. In general, the FLSA requires employees be paid one and a half times their regular rate of pay for all hours worked over forty hours in a given workweek. Under the FLSA, there are, however, certain exemptions. Employees who fall under one of these exemptions do not have to be paid overtime.

The Proposed Rule focuses on two general types of FLSA exemptions – the “white collar” exemption and the “highly-compensated worker” exemption.

White Collar Exemption

Under the FLSA (which itself is not changed by the Proposed Rules), the white collar exemption exempts from overtime certain employees in executive, administrative, professional, computing or outside sales roles. In order to qualify for the white collar exemption, the employee must be paid a minimum salary (as set by regulation) on a regular basis and have primary duties that meet certain requirements set forth in the regulation.

Because of the injunction that the Trump Administration did not challenge, the Obama-era regulations never went into effect. The regulations that are currently in place are from 2004. Under these regulations, to qualify for the white collar exemption, an employee must be paid a salary equivalent to at least $455 per
week (approximately $23,660 per year). There is a slight difference in the rules on how employees in computer related occupations can be compensated, which we will not address here. If implemented today, the Proposed Rule would increase the salary requirement to $679 per week (approximately $35,308 per year). Interestingly, this salary threshold is almost exactly halfway between the current threshold and the threshold under the Obama Administration’s final rules (which was $921 per week or approximately $47,892 per year).

Like the Obama Administration rules, the Proposed Rules would change the treatment of nondiscretionary bonuses and incentive payments for the purposes of the rules. Under the preexisting rules, non-discretionary bonuses and incentive payments do not count towards meeting the minimum salary threshold. If the Proposed Rules are implemented as proposed, employers will be able to satisfy up to 10% of the weekly salary requirement through non-discretionary bonuses and incentive pay provided that certain conditions are met.

**Highly Compensated Worker Exemption**

The other exemption which the DOL focuses heavily on in the Proposed Rule is the highly compensated worker exemption.

In order to qualify for the highly-compensated worker exemption, an employee must be paid a minimum salary, which is set by regulation and which is higher than the minimum salary set for the white collar exemption. To be exempt as highly-compensated, the employee must also have primary duties that include office or non-manual work and must regularly perform at least one of the covered duties identified for white collar exempt employees. In short, if an employee is paid a high enough salary to satisfy the highly-compensated exemption, there are less rigorous requirements imposed to determine what the employee’s primary duties must be to qualify for the exemption than there are for the white collar exemption.

Currently, the minimum salary threshold for a highly-compensated worker is $100,000 per year. If implemented today the Proposed Rule would increase this to $147,414 per year, which is actually significantly higher than the $122,148 per year that would have been sent under the Obama Administration’s final rules.

**Future Updates**

When the Obama Administration rolled out its final rules, there was much ado over the fact that the regulations provided for an automatic increase of the thresholds every three years. The new version of the Proposed Rules does not include an automatic update. The DOL does however appear to be contemplating a future need for updates (after all it has now been fifteen years since the thresholds were increased) and has sought comments whether the rule should include a regular schedule for future rulemakings to update the thresholds (so that businesses know when changes might be coming and workers don’t have to wait fifteen years for an update - though arguably many businesses would be happy for them to take fifteen years before they increased the amounts!).

**Progressing Towards Final Rules**

There is still much for the DOL to do before the Proposed Rules become final, including receiving and assessing public comments. The earliest we’d expect to see the final version of these rules is 2020 and once the final rules are announced there will be additional time before the regulations will go into effect.

The SBLC played an active role in submitting comments on the Obama-era overtime rules and intends to do the same with the new proposed rules. We encourage our members to share their thoughts and concerns on the rules with us so that they can be incorporated into this effort.
UPCOMING EVENTS

2019 Legislative meetings:

April 23, 2019 - ICBA offices – 1615 L Street, NW, Suite 900

June 4, 2019 - ICBA offices – 1615 L Street, NW, Suite 900

August 15, 2019 – Conference Call

October 1, 2019 - ICBA offices – 1615 L Street, NW, Suite 900

All meetings run from 10:00 AM to 12:00 noon